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Supreme Court, U.S.
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NO. 96-1476

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

ALLSTATE LIFE INSURANCE COMPANY,

Petitioner,

vs.

MICHAEL HIBMA, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF ARIZONA

RESPONSE TO MOTIONS FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF CALIFORNIA LIFE AND HEALTH INSURANCE COMPANIES and THE AMERICAN COUNCIL OF LIFE INSURANCE AND HEALTH INSURANCE ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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I.
The proposed briefs fail to raise any issues which are new or different from those posed by the Petitioner.

Rule 37 of the Supreme Court Rules requires that an amicus brief bring new issues to the attention of the court. Generally, amicus briefs are not favored. Despite knowing that Respondents do not consent, amicus briefs have been filed which fail to raise even one new issue. Indeed, the amicus briefs so closely follow the language of the Petition that portions appear to be quoted verbatim. This failure to follow the Rules should cause the court to deny the motions to allow amicus briefs and Respondents respectfully request that the court disallow the briefs and strike them from the record.

II.
This case is so unique that neither petitioners nor their Amici have cited even one case which contains similar facts.

Several facts exist here which are ignored by Petitioner and Amici. These facts are unlike those from any case cited by them. To suggest that this case is "recurrent" is to ignore the following facts:

1) The insurance agent who represents Petitioner and sold the policy in question *admitted* in deposition that the policy he sold

was not part of an *ERISA* plan. Petitioner and Amici have failed to cite even one case in any brief where the insurance carrier's representative admits the insurance policy is not, and was not contemplated to be, an *ERISA* plan.

2) The Petitioner never adequately proved that an employer paid for an employee's policy. Nearly every case cited by Petitioner and Amici begins with the factual assumption that the employer has, at very least, paid to provide insurance for some employee. The courts below ruled that the burden of this proof on this issue rested with the Petitioner and that they failed to meet their burden.

3) The insured, putative employer, and agent agree that they never intended to create an *ERISA* welfare benefit plan. All individuals involved with the purchase of the Hibmas' insurance policy testified that they contemplated the mere purchase of insurance, nothing more. In all of the cases cited by Petitioner and Amici, the insurance carriers and their representatives consistently took the position that the benefits involved were issued under an *ERISA* plan. None of the cases cited by Amici involve a transaction where ***all*** of the parties are in agreement.

4) Early in the litigation Petitioner by its conduct made a judicial admission that Arizona law applies to the case. Early in

the litigation, Petitioner filed a Motion for Summary Judgment which claimed that Arizona law applied to the insurance policy in question and suggested that Arizona law required that Summary Judgment be granted. Respondents filed a Cross-motion for Summary Judgment which agreed that Arizona law applied and suggested that the law required that judgment be entered for the Respondents. The trial judge agreed with the Respondents, granted our motion, and denied the Petitioner's motion.

After losing that motion, and approximately 3 years into discovery and litigation, the Petitioner for the very first time claimed that the health insurance sold was not insurance but an *ERISA* "welfare benefit plan". The trial judge saw through this charade, as did the Arizona appellate courts.

Under Arizona law, Allstate's prior admission that this case involves an insurance policy constituted a judicial admission which bound the Defendant and prohibited it from taking a contrary position later. See, Buehman v. Smelker 50 Ariz. 18, 68 P.2d 946 (1937), Brenteson Wholesale, Inc. v. Arizona Public Service 166 Ariz. 519, 803 P.2d 930 (App. 1990); Moore v. Blackstone 20 Ariz. 328, 180 P.2d 526 (1919); Fridenmaker v. Valley National 23 Ariz. App 565, 534 P.2d 1064 (1975); and others. See also, definition of "Judicial Admission" in Black's Law Dictionary.

Thus, under the facts of this case, not only did all of the parties to the transaction contemplate that this was a simple sale of a personal insurance policy, but so did Allstate's lawyers. Is there even one case from the federal circuits which contains such an admission as a part of its facts? What could be more unique?

6) Defendant has cited some case law to suggest correct documentation and government filings are not necessary to establish an *ERISA* plan. And, it is true that prior to litigation **nothing** whatsoever was done by anyone, including the defendant, to document or indicate in any way that an *ERISA* welfare benefit plan existed. But, in this case the company, its agents and everyone involved agreed that this insurance policy was not an *ERISA* plan **and** that there was **no documentation** to even suggest that this was a welfare benefit plan. In this case the lack of documentation supports the testimony. In the cases cited by Amici and Petitioner, the documentation conflicts with the testimony.

7) The impact of this case will go no farther than the parties involved here. The Arizona Appellate Court opinion is unpublished. Under the Arizona rules, therefore, the case cannot be cited as precedent. (See Brief in Opposition to Petition for Writ of Certiorari.)

8) The decision of the Arizona Court of Appeals pertains to a

specific settlement agreement between the parties. The court's supplemental memorandum opinion makes it clear that its decision is limited to the particular settlement agreement entered into between the Hibma family and Allstate--no one else is involved.

Conclusion

For anyone to take the position that this case addresses a recurring set of facts is ludicrous. This case is unique. The party admissions are unique. The case history is unique and the terms of the parties' settlement agreement is unique. The Amici have failed to cite any case law or any facts in this case that make it suitable as precedent. If this Supreme Court were to grant review, its opinion would have limited value as precedent due to the peculiar and unusual facts presented here. The facts are so unique that this case does not approach Pilot Life or any of the other federal court issues involving *ERISA*.

DATED May 29, 1997

Respectfully submitted,

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